Usha Rani a/p Subramaniam v Sivanes Rajaratnam

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S2-33-250 OF 1993
KAMALANATHAN RATNAM JC
23 JULY 1997

Family Law *— Matrimonial property — Division of property — Apartment purchased for investment purposes subsequently occupied by respondent — Whether equitable for court to order occupying party to pay an occupation rent to the excluded party — Division of proceeds from on-going private medical practice — Whether petitioner's efforts had a direct and proximate causal link to the development and progress of clinic — Whether lump sum payment ought to be ordered — Law Reform (Marriage and Divorce Act) 1976 s 76*

The petitioner and the respondent, both doctors, were married on 1 May 1983. By 27 October 1990, they had separated and a decree nisi was issued by the court on 17 September 1993, later made absolute on 9 May 1994. The couple had a daughter. The petitioner applied for division of various matrimonial assets, the Crescent Court apartment ('the apartment'), two clinics ('the Jalan Silang clinic' and 'the Bangsar clinic' respectively), savings of the respondent, and two insurance policies in the name of the respondent.

Evidence was led of each party's contribution of money and/or work towards the acquisition of the various assets during the marriage. Both parties had contributed money and work towards the opening and running of the Jalan Silang clinic, as well as in the acquisition of the apartment. As the petitioner's employer provided a house in Kenny Hills, this house was used as the matrimonial home and the apartment for investment purposes. The Bangsar clinic was opened after the parties were separated and the petitioner admitted she made no contribution to this clinic. Little evidence of a Citibank savings account owned by the respondent was put forth by the petitioner. As for the insurance policies, the respondent had not yet named his beneficiary, and indicated a desire to name their daughter as the beneficiary. The petitioner however argued that she should be named the beneficiary.

The most difficult assets to divide were the apartment and the Jalan Silang clinic. Regarding the apartment, the parties disagreed as to who had paid the cash down payment for the apartment. The respondent claimed he paid the down payment with his own money and monies from his Employee's Provident Fund. The petitioner claimed the cash down payment was from their pooled account. They did agree that a loan of RM93,000 was obtained from Citibank, and that RM25,000 to RM30,000 was spent on renovations. The petitioner claimed that as the respondent had mismanaged the apartment, he should be estopped from seeking a share of it. She noted that the respondent had only credited RM45,700 of the RM85,900 rental payments which should have gone to the bank to

pay the loan, and he had benefited personally from the use of this asset by refinancing it when he needed funds 'for business purposes'. Additionally, he lived in the apartment rent free from December 1993 onwards. The petitioner calculated that she was entitled to half of RM141,400, this figure derived by adding up the misappropriated rental payments, and the rent the respondent should have paid while he lived in the apartment. She further prayed that the apartment be sold and half the proceeds given to her and the other half held in trust by her for their daughter. She also asked that the respondent should bear two thirds of the redemption amount.

The respondent claimed that there had been no misuse of the rental monies as he was still paying off the loan. Furthermore, he contended that when one party voluntarily excludes herself from the family home, the occupying tenant in common was not liable to pay the other occupation rent merely by virtue of his sole occupancy, but the court could order the occupying party to pay the excluded party rent if it was equitable to do so. He argued it was not equitable for him to pay rent under the circumstances.

Regarding the Jalan Silang clinic, the main issues of contention were determining whether the petitioner should receive 20% or one third of the monies made by this asset, and the calculation of the value of the revenues made by the clinic in order to determine the quantum of their respective shares.

Held:

(1) Section 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides for the power of the court to order division of matrimonial assets. The expression 'matrimonial assets', though not defined in the Act, ought to be interpreted liberally (see pp 32D–I and 33A–E); *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 and *Shirley Koo v Kenneth Mok Kong Chua* [1989] 2 MLJ 264 followed.

(2) No award was made with regard to the Bangsar clinic since the petitioner herself had said in her evidence that it was only opened after the separation. The claim for a share of the Citibank account was also disallowed as the petitioner had not established any facts as to its existence. The petitioner, however, was allowed half share of other savings of the parties prior to the decree nisi being made absolute.

Since both parties had contributed to the apartment, the apartment was ordered to be valued and the sum of RM90,000 (ie the redemption sum before refinancing by the respondent) to be deducted from the said valuation; the petitioner was entitled to half the balance in cash (see pp 33F–I, 34A–B and 37D).

(3) The respondent had misused RM40,200 of the rental payments, and thus the petitioner was entitled to half this amount, with interest at 4%pa as compensation. The respondent could not live

free in the apartment because it had been bought as an investment property, not as a matrimonial home, and thus he had deprived her of income. She was entitled to one half the rental payments for the apartment. The respondent's arguments were without legal merit. Payment of half the rent to the petitioner would continue to be made until property was valued and the petitioner given her half share (see pp 37F–I and 38A); *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 211 and *Dennis v McDonald* [1981] 2 All ER 632 followed; *Loo Cheng Suan Sabrina v Khoo Oon Lin Eugene* [1995] 1 MLJ 115 distinguished.

(4) The Jalan Silang clinic which was opened during the subsistence of the marriage was undoubtedly a matrimonial asset. There was ample evidence to suggest that the petitioner's efforts had a direct and proximate causal link to the development and progress of the Jalan Silang clinic (see pp 38B and 39G); *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 followed and *Hoong Khai Soon v Cheng Kwei Eng* [1993] 3 SLR 34 distinguished.

(5) After determining the amount of profit made by the Jalan Silang clinic, which included reducing the amount by 30% for taxes, the court decided to award the petitioner one third of the respondent's net income from the clinic. No magical formula was used; the judge must use his unfettered discretion upon reviewing the whole facts. Given the petitioner's contribution, she was entitled to one third (see pp 41I and 42A–C); *Yeap Cheong Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230 and *Lee Puey Hwa v Tay Cheow Seng* [1991] 3 MLJ 1 followed.

(6) The respondent's lack of frankness in disclosure of his earnings and his less than candid conduct allowed the court to draw adverse inferences against him. Hence, there was no merit in the respondent's claim that he was unable to make the lump sum payment or be able to arrange for a lump sum payment (see p 42D–F); *Robinson v Robinson* [1982] 2 All ER 699 and *Ette v Ette* [1965] 1 All ER 341 followed.

(7) The respondent was free to nominate his daughter as the beneficiary of his insurance policies. The petitioner's claim that she should be named lacked any plausible reason (see p 42G–I).

[Bahasa Malaysia summary

Pempetisyen dan penentang, kedua-duanya doktor, telah berkahwin pada 1 Mei 1983. Pada 27 Oktober 1990, mereka telah berpisah dan suatu dekri nisi telah dikeluarkan oleh mahkamah pada 17 September 1993, yang kemudiannya menjadi mutlak pada 9 Mei 1994. Mereka mempunyai seorang anak perempuan. Pempetisyen memohon untuk pembahagian pelbagai aset suami isteri, pangsapuri Crescent Court ('pangsapuri tersebut'), dua buah klinik ('klinik Jalan Silang' dan 'klinik Bangsar' masing-masing), simpanan penentang dan dua polisi insurans dalam nama penentang.

Keterangan dikemukakan atas sumbangan wang dan/atau kerja setiap pihak terhadap pemerolehan pelbagai aset semasa perkahwinan itu. Kedua-dua pihak telah menyumbang wang dan kerja terhadap pembukaan dan pengurusan klinik Jalan Silang, serta pemerolehan pangsapuri tersebut. Oleh kerana majikan pempetisyen telah menyediakan sebuah rumah di Kenny Hills, rumah ini digunakan sebagai kediaman suami isteri dan pangsapuri tersebut untuk tujuan pelaburan. Klinik Bangsar dibuka selepas pihak-pihak berpisah dan pempetisyen mengaku bahawa dia tidak membuat apa-apa sumbangan kepada klinik itu. Keterangan yang sedikit tentang suatu akaun simpanan Citibank yang dimiliki oleh penentang dikemukakan oleh pempetisyen. Mengenai polisi insurans, penentang belum lagi melantik benefisiarinya, dan menunjukkan keinginan untuk melantik anak perempuan mereka sebagai benefisiari. Walau bagaimanapun, pempetisyen berhujah bahawa dialah yang patut dilantik sebagai benefisiari.

Aset yang paling utama untuk dibahagikan adalah pangsapuri tersebut dan klinik Jalan Silang. Berkenaan pangsapuri tersebut, pihak-pihak tidak bersetuju tentang siapakah yang telah membuat bayaran pendahuluan tunai untuk pangsapuri tersebut. Penentang menuntut bahawa dia telah membuat bayaran pendahuluan dengan wang sendiri dan wang daripada Kumpulan Wang Simpanan Pekerja. Pempetisyen menuntut bahawa bayaran pendahuluan tunai adalah daripada akaun bersama. Mereka bersetuju bahawa pinjaman sebanyak RM93,000 diperolehi daripada Citibank, dan bahawa RM25,000 sehingga RM30,000 dibelanja untuk pengubahsuaian. Pempetisyen menuntut bahawa oleh kerana penentang telah salah mengurus pangsapuri tersebut, dia patut diestop daripada meminta sebahagiannya. Beliau perhatikan bahawa penentang hanya mengkreditkan RM45,700 daripada jumlah RM85,900 bayaran sewa yang sepatutnya telah diberikan kepada bank untuk membayar pinjaman, dan dirinya sendiri telah mendapat manfaat daripada penggunaan aset dengan membiayai semula apabila dia memerlukan wang 'untuk tujuan perniagaan'. Tambahan pula, dia telah menetap di pangsapuri tersebut tanpa membayar sewa mulai dari bulan Disember 1993. Pempetisyen mengira bahawa dia patut mendapatkan setengah jumlah RM141,400, dan jumlah ini didapati dengan menambahkan bayaran sewa yang dilesapkan, dan sewa yang sepatutnya dibayar oleh penentang sewaktu menetap di pangsapuri tersebut. Dia selanjutnya memohon bahwa pangsapuri tersebut dijual setengah hasil diberikan kepadanya dan baki setengah lagi dipegang atas amanah olehnya untuk anak perempuan mereka. Dia juga meminta supaya penentang menanggung dua pertiga jumlah penebusan.

Penentang mendakwa bahawa tiada terdapat sebarang penyalahgunaan duit sewa kerana dia masih membayar pinjaman. Selanjutnya, dia menghujahkan bahawa apabila suatu pihak mengecualikan dirinya daripada kediaman keluarga, penghuni yang sedang menduduki yang sama tidak bertanggungjawab membayar

sewa penghunian kepada yang satu lagi semata-mata kerana dia adalah penghuni tunggal, tetapi mahkamah boleh memerintahkan pihak yang menghuni untuk membayar sewa kepada pihak yang dihalang sekiranya adalah saksama untuk berbuat demikian. Dia menghujahkan bahawa ia tidak saksama untuk membayar sewa di bawah keadaan begitu.

Berhubung dengan klinik Jalan Silang, isu yang utama adalah menentukan sama ada pempetisyen harus menerima 20% atau satu pertiga duit yang dijanakan oleh aset ini, dan pengiraan nilai hasil pendapatan yang dibuat oleh klinik bagi menentukan kuantum bahagian masing-masing.

Diputuskan:

(1) Seksyen 76 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 memperuntukkan kuasa mahkamah untuk memerintahkan pembahagian aset suami isteri. Ungkapan 'aset suami isteri', walaupun tidak ditakrifkan dalam Akta tersebut, patut ditafsirkan secara liberal (lihat ms 32D–I dan 33A–E); *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 dan *Shirley Koo v Kenneth Mok Kong Chua* [1989] 2 MLJ 264 diikut.

(2) Tiada award telah dibuat berkaitan dengan klinik Bangsar oleh kerana pempetisyen sendiri telah mengatakan dalam keterangan bahawa ia hanya dibuka selepas pemisahan. Tuntutan untuk sebahagian akaun Citibank juga tidak dibenarkan kerana pempetisyen tidak membuktikan apa-apa fakta tentang kewujudannya. Namun demikian, pempetisyen dibenarkan mendapat setengah bahagian simpanan lain pihak-pihak sebelum dekri nisi menjadi mutlak.

Memandangkan kedua-dua pihak telah menyumbang kepada pangsapuri tersebut, pangsapuri tersebut diperintahkan dinilai dan jumlah sebanyak RM90,000 (iaitu jumlah penebusan sebelum dibiayai semula oleh penentang) ditolak daripada penilaian itu; pempetisyen berhak mendapat setengah bakinya secara tunai (lihat ms 33F–I, 34A–B dan 37D).

(3) Penentang telah menyalah guna RM40,200 daripada bayaran sewa, dan justeru itu pempetisyen berhak mendapat setengah amaun ini, dengan faedah pada kadar 4% setahun sebagai pampasan. Penentang tidak boleh tinggal tanpa membayar sewa di pangsapuri tersebut kerana ia telah dibeli sebagai harta pelaburan, bukannya kediaman suami isteri, dan maka pempetisyen telah melucutkan pendapatan penentang. Dia berhak mendapat setengah bayaran sewa untuk pangsapuri tersebut. Hujah-hujah penentang adalah tanpa merit undang-undang. Bayaran setengah sewa kepada pempetisyen akan terus dibuat sehingga harta dinilaikan dan pempetisyen diberikan setengah bahagiannya (lihat ms 37F–I dan 38A); *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 211 dan *Dennis v*

McDonald [1981] 2 All ER 632 diikut; *Loo Cheng Suan Sabrina v Khoo Oon Lin Eugene* [1995] 1 MLJ 115 dibeza.

(4) Klinik Jalan Silang yang dibuka semasa perkahwinan wujud tanpa ragu-ragu adalah suatu aset suami isteri. Terdapat keterangan yang lebih daripada mencukupi untuk mencadangkan bahawa usaha pempetisyen mempunyai kaitan sebab akibat yang terus dan berdekatan kepada pembangunan dan kemajuan klinik Jalan Silang (lihat ms 38B dan 39G); *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 diikut dan *Hoong Khai Soon v Cheng Kwei Eng* [1993] 3 SLR 34 dibeza.

(5) Selepas menentukan amaun keuntungan yang didapati oleh klinik Jalan Silang, yang termasuk pengurangan sebanyak 30% untuk cukai, mahkamah memutuskan untuk mengawardkan satu pertiga pendapatan bersih penentang daripada klinik tersebut kepada pempetisyen. Tiada rumusan ajaib telah digunakan; hakim mesti menggunakan budi bicara yang tidak terbelenggu selepas mengkaji fakta-fakta keseluruhan. Memandangkan sumbangan pempetisyen, dia berhak mendapat satu pertiga (lihat ms 41I dan 42A–C); *Yeap Cheong Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230 dan *Lee Puey Hwa v Tay Cheow Seng* [1991] 3 MLJ 1 diikut.

(6) Kekurangan keterusterangan oleh penentang dalam mendedahkan pendapatannya membenarkan mahkamah membuat anggapan bertentangan terhadapnya. Justeru itu, tiada sebarang merit dalam tuntutan penentang bahawa dia tidak mampu membuat bayaran sekaligus atau mampu membuat aturan untuk bayaran sekaligus (lihat ms 42D–F); *Robinson v Robinson* [1982] 2 All ER 699 dan *Ette v Ette* [1965] 1 All ER 341 diikut.

(7) Penentang adalah bebas untuk melantik anak perempuannya sebagai benefisiari polisi insurans. Tuntutan pempetisyen bahawa dialah yang harus dilantik kekurangan sebarang alasan munasabah (lihat ms 42G–I).]

Notes

For cases on matrimonial property, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2129–2172.

Cases referred to

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109 (folld)
Dennis v McDonald [1981] 2 All ER 632 (folld)
Ette v Ette [1965] 1 All ER 341 (folld)
Hoong Khai Soon v Cheng Kwei Eng [1993] 3 SLR 34 (distd)
Lee Puey Hwa v Tay Cheow Seng [1991] 3 MLJ 1 (folld)
Loo Cheng Suan Sabrina v Khoo Oon Lin Eugene [1995] 1 MLJ 115 (distd)

Murtadza bin Mohamed Hassan v Chong Swee Pian [1980] 1 MLJ 211 (folld) A
Robinson v Robinson [1982] 2 All ER 699 (folld)
Shirley Koo v Kenneth Mok Kong Chua [1989] 2 MLJ 264 (folld)
Yeap Cheong Hock v Kajima-Taisei Joint Venture [1973] 1 MLJ 230 (folld)

B

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76

J Chandra (*Arbain Chandra Chew & Associates*) for the petitioner.
Fiona Bodipalar (*Sri Ram & Co*) for the respondent. C

Cur Adv Vult

Kamalanathan Ratnam JC:

The proceedings D

The parties to this divorce proceedings, both of whom are medical doctors, were married on 1 May 1983. They were separated on 27 October 1990 and a decree nisi was issued by this court on 17 September 1993 and made absolute on 9 May 1994.

By way of summons in chambers (enc 14), the petitioner is claiming E for a division of the matrimonial assets which include a property known as the Crescent Court apartment, a clinic called Klinik Inter-Med, its Bangsar branch, savings of the respondent and the insurance policies.

The facts F

At the time of the marriage, both parties were employed as medical doctors at the Mentakab District Hospital. After two years, the respondent resigned from government service and joined a group practice in Shah Alam. The respondent testified that he was then earning RM2,700 per month. A matrimonial home was set up in Shah Alam. It was a rented G house. There is no dispute that during this period the petitioner travelled to Shah Alam from Mentakab during the weekends. Shortly thereafter, the petitioner joined Keretapi Tanah Melayu ('KTM'). KTM provided her with a house in Kenny Hills. However, since the respondent worked in Shah Alam, the parties continued to live in the rented house in Shah Alam. The house in Kenny Hills was occupied by the petitioner's parents for a H period of nine months. By December 1986, the parties began using the KTM house as the matrimonial home and this remained so until their eventual separation in October 1990.

Sometime in 1987, the parties decided to set up a private medical practice and on 21 August 1987, the respondent opened a clinic at No 43, I Jalan Silang, Kuala Lumpur, called Klinik Inter-Med. The parties decided that the petitioner should stay back in government service which provided a stable income and with the benefit of free housing and maintenance. The

clinic was a sole proprietorship. It cost the parties RM70,000 to set up the clinic. The said sum was obtained from loans provided by the petitioner and the respondent. There was also an overdraft facility of RM30,000 obtained from Maybank and a term loan of RM15,000 from Citibank. The respondent also obtained an overdraft of RM10,000 from Citibank. Further, a sum of about RM10,000 was used from their joint savings as well as from borrowings from family members. The petitioner stood as guarantor for the loans and also assisted the respondent in obtaining the banking facilities. The petitioner also expended time on the clinic. She scouted around during her lunch breaks for a suitable place to set up the clinic, and finally identified the site at Jalan Silang. She contacted the owner and arranged for the banking facilities. She also arranged for a member of the KTM staff to draw plans for renovations and also arranged for the licence for the signage from City Hall. According to the petitioner, even the cleaning up was left to her.

For a period of 1½ years after the clinic was opened, the petitioner picked up the respondent from the clinic at 9pm daily, thereby saving on parking fees. For about a year, the petitioner herself assisted in the running of the clinic by working from 6pm to 9pm on most Fridays.

By all accounts, the clinic was not running too well in the first year. The respondent could not maintain the overheads and even laboured the thought of giving up the practice. In February 1988, the petitioner convinced the respondent to sell the family-owned Mazda car, to tide over the difficult period. The clinic started picking up from mid-1988. The respondent contributed regularly towards the household expenses but only up to December 1986; thereafter he stopped contributing. In December 1989, he recommenced contribution at RM200 per month until June 1990 from whence he increased the sum to RM400 per month. The petitioner denied the respondent's contention that on a regular basis he gave her cash towards the savings account amounting to RM800 to RM1,000.

In early 1990, the respondent purchased the Crescent Court apartment for RM117,000. He paid RM24,000 in cash and also withdrew RM12,700 from his Employees Provident Fund ('EPF'). He then obtained a loan of RM93,000 from Citibank. The petitioner contended that the cash down payment was from pooled resources. Both parties however concede that a sum of RM25,000 to RM30,000 was spent on renovations. The petitioner did the major supervision and also arranged for the premises to be tenanted.

The Crescent Court apartment was rented at RM1,600 per month for about a year and then at RM2,300 until September 1993 when it remained unoccupied until December 1993 when the respondent moved in and occupied the apartment. There were times when the rental was not credited into the Citibank account towards reduction of the overdraft facility. The said apartment was refinanced in late 1994 by the respondent, by way of an overdraft facility from the Bank of Commerce for RM125,000 after the respondent had redeemed it from Citibank for 'business purposes'.

During the subsistence of the marriage, the respondent opened up a branch in Jalan Bangsar in February 1993. The respondent's brother,

Dr Ranjit, operated the branch clinic in Bangsar. The respondent contributed a sum of RM10,000 towards the start up costs of RM60,000. The respondent denies being a partner of the clinic. The Bangsar clinic carried the same name, that is, Klinik Inter-Med. The petitioner contended that this was to benefit the Bangsar branch by luring the KTM staff to the said clinic and she also said that she was to assist the respondent to get into the KTM panel of doctors. From 1987 to 1993, the respondent operated four bank accounts, namely at the main Maybank Kuala Lumpur, Citibank Jalan Ampang, Maybank Finance and Bank Simpanan Nasional, Bangsar. At the main Maybank Kuala Lumpur, the respondent operated his personal current account which he closed in 1991 or 1992. From August 1989 to February 1992, the respondent withdrew a total of RM75,700 from his Maybank Finance Savings Account.

The court's findings

Section 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') reads:

> 76 Power for court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1), the court shall have regard to —
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage,
>
> and subject to those considerations, the court shall incline towards equality of division.
>
> (3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (4) In exercising the power conferred by subsection (3), the court shall have regard to —
>
> (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
>
> (b) the needs of the minor children, if any, of the marriage;
>
> and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case, the party by whose effort the assets were acquired shall receive a greater proportion.
>
> (5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one

A party which have been substantially improved during the marriage by the other party or by their joint efforts.

In *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, Mahadev Shankar JCA attempted to define matrimonial assets since no such meaning was given to it in the Act. His Lordship said at p 122:

B The Act does not define what matrimonial assets are. We think that during the subsistence of a marriage, the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by C the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.

In the same case, the Court of Appeal adopted with approval the liberal approach taken by Thean J in *Shirley Koo v Kenneth Mok Kong Chua* D [1989] 2 MLJ 264 where the purchase by the wife of kitchen cabinets, crockery, pots and pans and the payment of servants' salary, food and grocery bills were all added up as her contribution to a semi-detached house which the husband claimed he had solely acquired because he alone had paid for it. The Court of Appeal found that from the time the wife in E the case before them began to live in it, she had kept the house, maintained and serviced it as a going concern, thus enhancing its value from RM29,000 to RM175,000 partly as a result of her efforts.

(i) The Bangsar clinic

F Since the petitioner herself had said in her evidence that this branch at Bangsar was only opened after the separation, I made no award in respect of this clinic.

(ii) Savings

G The marriage took place on 1 May 1983 and the decree nisi was made absolute on 9 May 1994. The agreed bundle of documents at p 248 shows the last savings balance as at 3 March 1992 prior to the decree nisi being made absolute as amounting to RM2,266.99. I therefore awarded the petitioner half this sum amounting to RM1,133.

H (iii) Citibank savings account

During her evidence, the petitioner testified that in 1990, she had seen a savings account book from Citibank in the respondent's briefcase and that the account showed a balance of RM90,000 then. It was submitted by the petitioner that since she was not cross-examined on this, it must be I accepted as correct and she therefore prayed for half the said sum.

In encl 27 which was an affidavit filed by the respondent, he had annexed as exh SR–5 all bank accounts of Malayan Banking and Citibank. A notice to produce was also served. Surely if the petitioner was of the view

that there was such a savings book showing such a large balance, it was the duty of the petitioner to have pursued this claim by binding the respondent with interrogatories which is a method used to discover facts. In other words, a person can be ordered to answer as to the existence of some fact within his knowledge and relevant to a dispute. In the circumstances, since it is the allegation of the petitioner that there is such an account, and since the onus is on the petitioner to establish this fact, it is my finding that the petitioner has failed to do so. In the circumstances, the claim for a share of this account must fail.

(iv) The Crescent Court apartment

I totally agree with and adopt the views of Mahadev Shankar JCA in *Ching Seng Woah*'s case. Marriage is a sanctimonious union of two persons joined in holy matrimony and their avowed purpose ought to be to build a homey niche for themselves and their brood. It would have been their intention to call their joint efforts, not as mine and thine but as ours. Unfortunately, when a break-up occurs, the joint efforts must be recognized; the courts must reject the resurging cries of thine and mine. As a general rule, the court should consider distributing the assets on equal basis. The petitioner argued that since the respondent had mismanaged this asset in that since he had not promptly credited the monthly rentals and had benefitted personally from the use of this asset by refinancing it when he needed funds 'for business purposes', he should be estopped from seeking a share of the apartment. The petitioner pointed out that from 1 May 1990 to 30 September 1992, the respondent had only credited an amount of RM45,700. Since the apartment was tenanted at RM1,600 for one year and at RM2,300 up to September 1993, an amount of RM85,900 should have been credited into the Citibank account. Hence, there was a shortfall of RM40,200. The apartment was untenanted for three months, that is from September to November 1993 and the loss of rental amounting to RM2,300 x 3 months is RM6,900. Then from December 1993 to April 1997 (for purposes of calculation), the respondent was living in the apartment for 41 months. The rental at RM2,300 x 41 months amounted to RM94,000. The total loss was therefore assessed at RM141,400. The petitioner therefore prayed for half of RM141,400 and for an order that the apartment be sold and one half of the proceeds be given to the petitioner and the other half to be held by the petitioner as trustee for Shaleen, the daughter of the marriage until she reaches the age of 18 or alternatively for the apartment to be transferred to the petitioner to deal with the same howsoever she may deem fit and proper. The demand for half share to be held in trust for Shaleen was prompted by the respondent's concession in his affidavit (encl 18), wherein he stated that he was prepared 'to make all mortgage payments on the condominium aforesaid until the loan is fully settled. The condominium can then be transferred to the petitioner to be held in trust for Shaleen until she reaches the age of 21 at which time the property will vest with Shaleen absolutely'. The petitioner also argued that the respondent should bear at least two thirds of the

redemption amount, following the Singapore decision in *Shirley Koo* where a similar order was made.

The respondent, on the other hand, argued that the said apartment was paid for by him, after he had taken a loan from Citibank and from his EPF withdrawals. The respondent submitted that even if the rentals were not credited towards the account, he was in any case paying for the loan and that the fact that the rental was not credited into the account was therefore irrelevant. As for seeking a share of the rentals when the respondent was himself staying in the apartment, the respondent argued that the petitioner herself could have stayed in the apartment but chose not to do so. He argued that he was legally entitled to stay in the apartment as he is the person paying the instalments of the loan. The respondent relied on *Loo Cheng Suan Sabrina v Khoo Oon Lin Eugene* [1995] 1 MLJ 115 ('*Sabrina*'), where Vincent Ng J held that where an association similar to a matrimonial relationship breaks down and one party is excluded from the family home by the other, a tenant in common is not liable to pay an occupation rent merely by virtue of being the sole occupant but the court may order the occupying party to pay an occupation rent to the excluded party if it is equitable. However, where a spouse (legal or de facto), who is the tenant in common or co-owner of a matrimonial home is in a position to enjoy his or her right to occupy but chooses not to do so voluntarily, then the other who is in occupation is entitled to do so without paying an occupation rent. In the case before him, the plaintiff had left the property voluntarily and the learned judge held it would be highly inequitable to order the defendant to quit and/or pay an occupation rent unless and until their marriage was legally annulled.

To my mind, the decision in *Sabrina* can easily be distinguished from the facts herein. In *Sabrina*, the plaintiff testified that she left the matrimonial home voluntarily because she found the defendant had lied to her and that she never had her freedom as the defendant did not trust her. The learned judge made a finding of fact that the plaintiff left the matrimonial home, the subject in question, voluntarily 'as she had wanted to regain her freedom and was thus not driven out by the defendant'. The learned judge was guided by the decision in *Dennis v McDonald* [1981] 2 All ER 632 which laid down the principle that where an association similar to a matrimonial relationship broke down and one party was excluded from the family home by the other party, the principle that a tenant in common was not liable to pay an occupation rent merely by virtue of being the sole occupant did not apply and the court had power on general principles to order the occupying party who was a tenant in common with the excluded party to pay an occupation rent to the excluded party *if it was equitable* that such a rent should be paid.

In *Dennis v McDonald,* the property in question was their matrimonial home. Hence, since the father had forced the mother who was his mistress out of the house by his violence or threatened violence and thereafter had prevented her from returning to the house with the five children born out of the co-habitation, in circumstances similar to constructive desertion, it

was held equitable that he should pay her an occupation rent which was to be assessed on the basis that he had a tenancy of the house analogous to a protected tenancy and that therefore that half of the fair rent payable under a protected tenancy, was held payable to the mother.

In the case before me, the Crescent Court apartment was bought as an investment and it was bringing in rental which was being paid towards the loan so that subsequently the parties would have the apartment unencumbered and could benefit from the rent. The Crescent Court apartment was not the matrimonial home and therefore clearly the decision in *Sabrina*'s case would not apply to this case. Further, the petitioner never lived in the apartment, nor did she leave it voluntarily or otherwise. The principles of equity referred to in *Dennis v McDonald* must apply and it is inequitable for the respondent to live rent free in the apartment bought solely for investment purposes. It is unacceptable for the respondent to suggest that the petitioner ought to have herself stayed in the apartment when she already had a home to stay in and when she knew that the apartment was bought as an investment.

I was asked to consider the fact that the respondent had no means of paying any lump sum to the petitioner and that such an order would cause the respondent undue hardship. It was also pointed out to me that there is still a large sum due to Citibank regarding the housing loan and that the parties would derive no benefit from selling the apartment at this time. The respondent submitted that he be allowed to remain in the apartment and continue to pay the instalments on the apartment until Shaleen attains the age of 18 at which time the apartment should be sold and half the proceeds be given to the petitioner and the other half be given to Shaleen. The respondent undertook not to encumber the apartment with any further charges.

Having heard the arguments and since I was not shown what the redemption sum was that was actually paid to Citibank by the respondent and since the redemption and refinancing with the Bank of Commerce was in late 1994 and that the refinancing was done for the respondent's own business expenses, I made an order directing that the said Crescent Court apartment be valued by a qualified valuer and that, without having to sell the said apartment, the petitioner be given half the said value. I also ordered that the existing redemption sum and the earlier redemption sum paid to Citibank are to be borne by the respondent. I also directed that there be liberty to apply for directions, if necessary.

As regards the rentals, the total rentals that ought to have been credited was RM85,900. However, only RM45,700 was credited. To my mind, this shortfall should be disregarded because although the rentals were to be paid towards the loan and yet not paid, however in any case, the respondent had been settling the loan. In the circumstances, I made no award with regard to this claim for rentals by the petitioner. As soon as I had made this order, counsel for the respondent requested a short adjournment till the next day to enable her to discuss with the petitioner's solicitors further matters relating to the Crescent Court and Klinik Inter-Med.

When the court convened the next morning, that is on 6 May 1997, Ms Bodipalar pointed out that p 160 of the agreed bundle of documents did indeed show the redemption sum as at 31 March 1994 as being RM103,908.61. Further, in the affidavit of the respondent (encl 18), the respondent had said that he had paid RM1,000 a month towards the repayment of the overdraft facilities and since he had moved into the apartment in December 1994, she pointed out that the respondent would therefore had paid for nine months amounting to RM9,000. In the circumstances, the final redemption sum would have been RM103,908.61 less RM9,000 and she accepted a round figure of RM90,000 which she submitted was the redemption sum before refinancing and which sum ought to be discounted. In reply, Mr J Chandra for the petitioner did not oppose this submission but left it to the court.

It therefore became necessary for me to vacate the order made the day before in respect of the Crescent Court and the rentals on the basis that this evidence of the redemption sum had not been shown to me earlier. I then made the following order which was that the said Crescent Court apartment be valued by a qualified valuer to be agreed to by both parties and the sum of RM90,000 to be deducted from the said valuation and the petitioner is therefore entitled to half the balance in cash. I gave the parties liberty to apply.

In respect of the rentals, it is common ground that from 1 May 1990 to 30 September 1992, the respondent did not credit all the rentals into the account. The total amount credited amounted to RM45,700. It is again common ground that the total rentals would have been RM85,900. The respondent ought to have therefore credited a sum of RM40,200 which is the shortfall. The respondent had utilized this amount for his own benefit. I therefore granted the petitioner half of the shortfall amounting to RM20,100, since credit for the redemption sum has already been given.

Since the respondent had utilized the same for his benefit and deprived the petitioner of the use of her share, I ordered interest to be paid at 4%pa on the sum of RM20,100 from 1 October 1992 to date of judgment on the basis of *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 211 where the Federal Court held that the reason for awarding interest is to compensate the successful party from being kept out of money which theoretically is due to her.

Since the respondent is continuing to live in the said apartment from 1 October 1993, I ordered that the respondent ought to pay the petitioner half the rental of RM2,300 per month. The rental from 1 October 1993 to 1 June 1997 is for a period of 44 months which at RM2,300 per month amounts to RM101,200. The period from 1 October 1993 to 1 December 1994 when the respondent redeemed the property is 15 months and taking half the rental at RM1,150, I shall round it up to RM15,000. Taking off this figure of RM15,000 from RM101,200 leaves RM86,200.

I therefore ordered the respondent to pay the petitioner half of RM86,200, that is RM43,100 and continuing until such time as the said

property is valued and the petitioner given her half share. I exercised my discretion and made no order for interest on this arrears of rental.

(v) Klinik Inter-Med ('the clinic')

Based on the definition of matrimonial assets as enunciated by Mahadev Shankar JCA, there is no doubt in my mind that the earnings and goodwill of the clinic is a matrimonial asset. The clinic was opened during the subsistence of the marriage. The petitioner had testified that she had contributed towards the opening of the clinic. She had arranged for the banking facilities and even stood as a guarantor. When they were in need, even the family car, the Mazda, was sold to tide over the difficult period. The respondent admitted that about RM10,000 of their savings had been utilized in the opening of the clinic. Furthermore, there was clear evidence that during the initial years, the respondent stopped contributing towards the household expenses. The respondent had no rental payments to worry about as the house provided to the petitioner by KTM resolved that issue. All the while, the petitioner was working and continued working even when the clinic was doing well. In other words, the petitioner contributed financially and physically in the setting up of the clinic, thereby enabling the respondent to devote his energy to the running of the clinic.

The respondent conceded monies started coming in about more than a year after the practice was set up. He testified that the average income for 1988 was RM2,000 per month; for 1989 RM3,000 to RM4,000 per month; for 1990 RM5,000 to RM6,000 per month; for 1991 and 1992 RM7,000 to RM8,000 per month and for 1993 RM8,000 to RM9,000 per month.

I do not accept these figures. It is his evidence that in 1993 he was seeing 80 patients per day and that on an average each patient paid anything between RM12 to RM18. The clinic was open 7 days a week. Except on Sundays when it was open from 9am to 1pm, the rest of the week it was open from 8am to 9pm. In other words, the clinic was open for 26 full days and 4 half days making 28 full working days. The respondent also took home RM300 to RM400 cash daily and this works out to RM350 x 28 days amounting to RM9,800 per month. He testified that the company patients made up about 70% of the patients and cash patients about 30%. The cash collections were utilized towards payment of staff personal expenses and payment of doctors. Since no evidence was adduced otherwise, I must accept that the cash taken home by the respondent must be net of the payments made.

Calculation of the respondent's expenses

He said he had between four to five nurses and paid them RM350 to RM400 per month. Taking five nurses at RM400 per month, the figure is RM2,000. His personal expenses amounted to RM6,350. He employed two doctors at RM4,160 per doctor and this amounted to RM8,320. These total expenses therefore would amount to RM16,670. In other

words, his total cash earnings per month in 1993 must be RM16,670 + RM9,800 amounting to RM26,470. Now, if the cash income is only 30% of the total income, simple arithmetic shows that the total income per month must be RM88,200.

He also testified that his other monthly expenses were rental payments of RM4,100, drugs amounting to RM5,000 to RM6,000, say RM5,500 on an average, and telephone, electricity and water charges amounting to RM1,000. His expenses would therefore be RM10,600. His net income in 1993 would have been RM88,200 – RM10,600, that is RM77,600. Clearly therefore, neither his evidence in court that his income for 1993 had averaged RM8,000 to RM9,000 per month nor his income tax returns for 1992 and 1993 showing an income of RM54,774 and RM77,589, thus showing an average earnings of RM4,500 and RM6,500 per month, can stand up to detailed scrutiny. When it was put to the respondent that he had under-declared his income for the 1992 year of assessment, he replied that the tax returns were done by his accountant. He testified that he had not instructed his accountant that those were not the correct figures.

In *Hoong Khai Soon v Cheng Kwei Eng* [1993] 3 SLR 34, the wife sought to bring into the purview of the matrimonial assets a one-third share in a family restaurant owned by the husband wherein he was a sleeping partner. In rejecting this claim, the Singapore Court of Appeal held that there was no evidence to show that the wife's efforts at domestic chores and as a cashier at an unrelated business contributed to an increase in the profits of the restaurant. In delivering the judgment of the court, Lai Kew Chai J said at p 38:

> This was not a case where a spouse's efforts in the home frees the other spouse to devote his or her energies to the running of a business. Here the husband took no active role in the running of the restaurant.

To the contrary is the case before me. To my mind, each case depends on its own set of facts. In *Hoong Khai Soon*, the court found as a fact that there was no direct causal link between the wife's efforts and the improvement of the asset. In the case before me, I find as a fact based on the plenitude of evidence that the wife's efforts had a direct and proximate causal link to the development and progress of the clinic.

On 5 May 1997, I made a finding that his income was RM88,000 and his total expenses RM28,670 and that therefore, his net income was about RM60,000 per month. Taking off 30% for tax, I assessed his income at RM42,000 per month and I therefore assessed his annual income for 1993 at RM42,000 x 12 amounting to RM504,000. Before I could continue, Ms Bodipalar interrupted to ask for a short adjournment to submit further on this aspect as she did earlier for the Crescent Court apartment.

The next day, in the course of her submission, Ms Bodipalar agreed that based on the RM350 per month cash the respondent took home, and his submission to income tax of an earnings of RM8,000 to RM9,000 per month for 1993, the two figures could not be reconciled. She submitted that the respondent's earnings should be calculated on the following basis:

For 1989 a sum of RM4,000 per month.
For 1990 a sum of RM5,000 per month.
For 1991 a sum of RM5,000 per month.
For 1992 a sum of RM6,000 per month.
For 1993 a sum of RM8,000 per month.

This amounted to RM336,000 for the five years. She suggested 30% off for income tax, thus leaving a balance of RM235,200. She suggested that I should, if inclined to do so, award only 20% which she worked out at RM47,040. Relying on *Lee Puey Hwa v Tay Cheow Seng* [1991] 3 MLJ 1 (CA), the respondent submitted that I ought not to make an order for a lump sum payment. In that case, the Singapore Court of Appeal held that in deciding whether to order a lump sum payment, the court should consider the individual circumstances of the parties, particularly the needs of the wife and the obligations and responsibilities of the husband, in addition to his assets, his earning capacity and other available resources. It further held that an order for a lump sum should not be made if the husband does not have adequate cash or other capital assets which can be readily disposed of, or if the lump sum payment or the disposal of assets will effectively cripple his earning power.

Mr Chandra, on the other hand, pointed out that the respondent has stated his 1993 earnings as RM50,000 to RM60,000 to RM70,000 per month. He therefore took the average at RM60,000. He conceded to the total deductions at RM28,670 which incidentally was the same figure that Ms Bodipalar also took into consideration in deducting the expenses. Mr Chandra's calculations showed the net income at RM31,330 per month for 1993. He then proceeded to deduct an arbitrary 20% off for each year and arrived at the sum of RM25,000 for 1992, RM20,000 for 1991, RM16,000 for 1990 and RM12,800 for 1989. He therefore arrived at a sum of RM1,261,560. He submitted that no deductions be made for income tax since the respondent had said he had already paid the tax and that therefore any further deductions would mean that the sum deducted would go only to the pocket of the respondent. He therefore submitted I award the petitioner one-third of the sum. I reserved judgment on this aspect to 12 May 1997 when I vacated the earlier partial finding I made with regard to the respondent's earnings for 1993. Instead, having considered the further submissions of both counsel on this issue, I accepted the earnings of the respondent in 1993 as RM60,000 and in 1992 as RM50,000 and in 1993 as RM30,000 per month from the respondent's own admission. I therefore worked out the figures as follows:

1993	
Earnings per month on his own admission	RM60,000
Less expenses (as agreed by both parties)	RM28,670
	RM31,330

A I averaged it to RM30,000.

1992

Earnings per month on his own admission	RM50,000
Same expenses	RM28,670
	RM21,330

C I averaged it to RM20,000.

1991

Earnings per month on his own admission	RM30,000
Expenses to be proportionately deducted by 35% being less for drugs, staff	RM18,000
	RM12,000

1990

I would estimate income at	RM20,000
Expenses proportionately reduced by about 30%	RM12,000
	RM 8,000

1989

I estimate the income as	RM15,000
Expenses estimated at	RM10,000
	RM 5,000

H The total for the five years amounted to RM900,000. I rejected the petitioner's submission that no sum should be deducted for taxes. In principle, the sum earned must be taxed. In *Yeap Cheong Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230 at p 235, the court deducted 25% for income tax which the plaintiff had to pay on receiving the lump sum in damages. I would therefore deduct 30% for taxes leaving a balance of RM630,000.

I The next question I have to ask myself is whether I ought to follow the suggestion of the respondent and award 20% or as suggested by the petitioner, award one third the sum. How does one decide on this? There ought to be no magical formula. There must be absolute unfettered

discretion vested with the trial judge who would have assessed the entire situation and assimilated the whole facts. My views on this are consonant with that of Yong Pung How CJ who said in *Lee Puey Hwa* at p 3:

> Even where a lump sum payment is considered, the making of the lump sum is pre-eminently a matter of discretion for the judge hearing the application and a Court of Appeal will not interfere with an order made by a judge unless it is clear that the judge exercised his discretion on a wrong principle or in exercising his discretion, has made a decision which is improper, unjust or wrong.

In the circumstances, it is my considered judgment that taking into consideration the efforts and contribution of the wife, she ought to be entitled to one third the sum which I have rounded up to RM200,000.

On the question as to whether I ought to be guided by *Lee Puey Hwa* and not make a lump sum award as submitted by the respondent, it is pertinent that I look at the conduct of the respondent. I find his conduct less than candid and more of an intrigue. His evidence concerning his earnings as found by me was far from satisfactory. Being as charitable as I can towards him and even if I were to accept that there was no deliberate attempt to hide his true income, I cannot but find that he was at least careless in failing to disclose to the court his true earnings. As was found in *Robinson v Robinson* [1982] 2 All ER 699, full and frank disclosure is important. In fact, in *Ette v Ette* [1965] 1 All ER 341, the court found that in the absence of any frank disclosure, the court is entitled to draw inferences adverse to the husband as to his capacity or faculties and to treat him as a man in a position to command a very substantial income. In the circumstances, I see no merit in the plea that the respondent will be unable to make the lump sum payment or to be able to arrange for such lump sum payment.

(vi) Insurance policies

The respondent had bought two insurance policies, one with the Great Eastern for RM50,000 and the other with the AIA, also for RM50,000. In his submission, the respondent stated that he was willing to name Shaleen as the beneficiary since he has as yet not named any beneficiaries to both the policies. The petitioner however argued that she should be named as a beneficiary and that the respondent be directed to continue the monthly instalments until their respective maturity or that alternatively an order be made that the policies be cashed out and the proceeds be paid to the petitioner.

There is no plausible reason for the petitioner's demand. Appointment of a beneficiary is at the sole discretion of the policy holder. Since he has now evinced a desire to nominate Shaleen as the beneficiary, I made an order that the respondent do within seven days of the order nominate and appoint Shaleen as the sole beneficiary and that if for any reason the respondent intended to remove her name as a beneficiary, he ought to obtain the leave of the court since her appointment now is upon an order of the court.

A It was my opinion that this is a fit and proper case for me to exercise my discretion and award costs to the petitioner.

Order accordingly.

Reported by K Tang-Wai

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